IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plaintiff in Error*,

vs.

THADDEUS A. HOPKINS.

No. 1,173.

Brief for Plaintiff in Error on Motion to Dismiss for want of Jurisdiction.

ENOCH TOTTEN,
For Pltff. in Error.

R. O. POLKINHORN, PRINTER,

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STATEMENT OF THE CASE.

The plaintiff in the court below, by his declaration, claimed that the defendant used the street in front of his premises unlawfully, for the following purposes, to wit:

1. Loading and unloading freight cars;
2. Shifting cars back and forth for the said purpose of being so loaded and unloaded there, and thereby creating disturbing noises, smoke, cinders, &c.;
3. Storing or parking cars, loaded and empty, some of which were filthy, and emitted offensive odors;

4. Leaving locomotive engines standing an unreasonable time, and emitting smoke, cinders, &c., and creating disturbing noises.

The defendant below pleaded among several pleas, the plea of not guilty.

The freight station of the plaintiff in error is situated in square 386 at the original terminus of the road between 9th and 10th streets, on Maryland Avenue. (See Diagram attached to record.) The plaintiff below resided in his dwelling house in the square opposite on the north side of Maryland Avenue, and between the same lateral streets.

On the trial of the cause, the plaintiff gave evidence tending to prove the truth of the allegations in his declaration, and the defendants gave evidence in its own defense. The defendant proved that the authorities of the District of Columbia, in 1874, enclosed the tracks of the railroad with a line of stone curbing on each side which were about six inches higher than the adjacent surface of the streets, and that the tracks were elevated so as to be flush with this curbing (21.) That the point between 9th and 10th streets was regarded and treated as the *termini* of two lines of railroad, that is to say, one coming from Virginia, and the other from Maryland, and that the freight trains habitually stopped there as at the end of the route, and changed engines, etc. (19, 20.)

The defendant on the trial claimed (29) that it possessed and exercised authority by virtue of the grant from the United States, to load and unload cars on the elevated space enclosed by and between the curblines erected by the Board of Public Works with-

out liability to the plaintiff. This authority was not only questioned, but it was denied by the plaintiff, and the Court decided against the validity of such authority, (29).

The defendant below on the trial of the cause, relied on and asserted the right and authority, under several acts of Congress to do and perform the following acts, among others, to wit:

To carefully move its locomotive engines or trains over the railroad tracks on Maryland Avenue in front of the plaintiff's property without being responsible for damages caused by smoke, soot, or cinders expelled from, or for noises made by its engines so moved. (See XIII., prayer, p. 30.)

To exercise *unlimited* use of the tracks in front of the plaintiff's residence for the purposes of its freight house, provided such use was careful and skilful, (See XIV., prayer, p. 30.)

To construct as many freight stations and convenient tracks near them, as its officers might deem necessary for the convenient conduct of its business, and to use such tracks for the proper and careful management of its business without liability to be mulcted in damages, (page 31.)

To use the public street to a *reasonable* extent for the purpose of loading and unloading cars. (32.)

To use its tracks in the locality in question to make up as well as break up its trains. (32, 33.)

To carefully use the tracks in front of the plaintiff's premises so far as was necessary for the lawful and careful use of its stone-yard, which it constructed (21) and maintained at the corner of 14th street and Maryland Avenue (31 and 32), and also in connection

with its engine house at the corner of 6th street and Virginia Avenue. (33 and diagram.)

The validity of the defendant's authority thus claimed and exercised under its charter was questioned by the plaintiff on the trial, and was denied by the court.

The plaintiff in the trial court especially contended, amongst other things, that while the defendant company might permit its locomotive engines to stop on the avenue in front of the plaintiff's house as long as it might be necessary in the conduct of its "through business," and as long as it might be necessary to the careful use of its freight house *opposite the plaintiff's dwelling house*, yet that such engines could not be permitted to stop in connection with other business which was not "*through business*," nor in connection with the use of any other of the stations of the company, shown by defendant's evidence to be established and used by the company in that vicinity. (24, 25.) The defendant company asserted the contrary.

Points and Authorities.

The plaintiff in error, in the trial court, relied on an authority exercised under the United States derived through several acts of Congress to occupy and use the portion of the streets in controversy, in the manner and for the purposes claimed, and the defendant in error denied the validity of the asserted authority. The question made by this motion, is this: *has this court jurisdiction to review the judgment of the court below under the provisions of the second section of the act of March 3rd*, 1885?

The foregoing references to the record are sufficient to show the nature of the controversy.

There was no question made as to the validity of the several acts of Congress authorizing the railroad company to construct and maintain the railroad in the city, but the authority of the company, under those acts, to transact its legitimate business in the ordinary way was denied. The court below sought to circumscribe and arbitrarily limit the defendant in the exercise of many of the most important rights and privileges conferred by the acts of Congress. It is of this the plaintiff in error complains. Its whole authority to occupy the streets of Washington was derived from the United States, and its authority to use them in the manner in which it claims the right to use them, was derived from the same source. The company has no authority for being on the street and exercises none in the use of it in any manner or to any extent, except the authority derived from the United States. The validity of this authority exercised by the railroad company in and upon the street, was drawn in question in the court below and was there passed upon.

The writ of error was sued out in this cause on the authority of the second section of the act of Congress above mentioned, approved March 3d, 1885. (23 Stat., 443.) That section authorizes the allowance of a writ of error to the Supreme Court of the District of Columbia, without regard to the sum or value in dispute in—

"*Any case in which is drawn in question the validity of* * * * * * * *an authority exercised under the United States.*"

The appellate jurisdiction of this court conferred by this statute is not the same as that given by the first branch of section 709 of the Revised Statutes, which confers jurisdiction to review the judgments and decrees of State Courts. That part of that section grants such authority in cases "where is drawn in question the validity of * * * * * * an authority exercised under the United States, *and the decision is against their validity.*" It is plain that the last mentioned statute served as the model when the second section of the statute under consideration was drawn. The very important words found in this parent act, but omitted from the act of 1885, were omitted for some purpose. This purpose must have been to enlarge the appellate jurisdiction of this court over judgments and decrees of the Supreme Court of the District of Columbia, as compared with its appellate jurisdiction over the final judgments of State Courts. Therefore, whenever the record discloses the fact that an authority exercised under the United States has been drawn in question in the Supreme Court of the District of Columbia, this court has appellate jurisdiction, without reference to whether the judgment of that court was for or against the validity of the authority claimed and asserted, without regard to the sum in dispute. If the decision of the court below had been in favor of the validity of the authority claimed by the company, the appellate jurisdiction of this court would have existed as it does now.

This statute has been twice before this court. The first cause brought here on its authority was the case of the District of Columbia *vs.* The B. & P. R. R.

Co., (114 U. S., 453). The controversy in that case arose in reference to conflicting claims to authority on a public street. No "sum" and no matter of "value" whatever was in dispute. This statute was relied upon by the counsel for the appellant in that case, for jurisdiction and the law was set out in full, on the sixth page of his brief. The appellant there claimed exclusive authority and control over a certain puplic street in Washington, and the Supreme Court of the District of Columbia denied its authority, as against the rights of the railroad company under its charter. Both parties claimed to exercise their asserted authority by virtue of acts of Congress. The court made no question as to its jurisdiction and decided the cause on its merits.

The second case was that of the District of Columbia *vs.* Gannon, No. 182, on the present docket. In the latter case a motion to dismiss, for want of jurisdiction, was made because the matter in dispute, exclusive of costs, did no exceed $5,000.00. The motion was postponed January 18, 1886, to be heard with the cause on final argument on the merits. Had the motion in that case been allowed, it would hardly have formed a precedent in the present motion.

STATUTORY PROVISIONS.

The statutory provisions in reference to the railroad, which are deemed material in the censideration of the question now before the court, are copied below, to wit:

The first section of the act of Congress of February 5, 1867, (14 Stat., 387,) adopting the charter of the company granted by Maryland, is as follows:

"Whereas, it is represented to this present Congress that the Baltimore and Potomac Railroad Company, incorporated by an act of the General Assembly of Maryland, entitled 'An act to incorporate the Baltimore and Potomac Railroad Company, passed the sixth day of May, eighteen hundred and fifty-three, are desirious, under the powers which they claim to be vested in them by the provisions of the before recited act, to construct a lateral branch from the said Baltimore and Potomac railroad to the District of Columbia.'

"*Therefore be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Baltimore and Potomac Railroad Company, incorporated by the said act of the General Assembly of Maryland, shall be, and they are hereby, authorized to extend to and within the District of Columbia, a lateral branch, such as the said company shall construct or cause to be constructed, in a direction towards the said District, in connection with the railroad which they are about to locate and construct from the city of Baltimore to the Potomac river, in pursuance of their said act of incorporation; *and the said Baltimore and Potomac Railroad Company are hereby authorized to exercise the same powers, rights and privileges, and shall be subject to the same restrictions in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to, under and by intent of their said charter or act of incorporation, in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits, and immunities, in the use of the said road, and in regard thereto, as are provided in their said charter, except the right to construct any lateral road or roads within the said District;* from the said lateral branch or road hereby authorized, it being expressly understood that the said Baltimore and Potomac Railroad Company shall have power only to construct from the said Balti-

more and Potomac railroad one lateral road within the said District to some point or terminus within the city and county of Washington, to be determined in the manner hereinafter mentioned."

The twelfth section of the Act of the Legislative Assembly of Maryland (the charter), referred to in the above-mentioned act of Congress, is as follows, to wit:

"SEC. 12. *And be it enacted*, That the president and directors of the said company shall be, and they are hereby invested with all the rights and powers necessary to the construction, working, use, and repair of a railroad from some suitable point in or near the city of Baltimore, and thence within one mile of the town of Upper Marlboro, in Prince George's County, and as near to said town, within the limits of said distance, as may be practicable, and by or near the town of Port Tobacco in Charles county, to a point on the Potomac river, to be selected by the president and directors of said company hereby incorporated, not higher up than Liverpool Point, and not lower down than the mouth of St. Mary's river, with such branches at any point of said railroad, not exceeding twenty miles in length, as the said president and directors may determine. *The said road when completed not to be more than sixty-six feet wide, except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary;* and the said president and directors may cause to be made, or may contract with others for making, said road or any part of it, and they or their agents, or those with whom they may contract or their agents, may enter upon and use and excavate any lands which may be wanted for the site of said road or the erection of warehouses or other works necessary for the said road or for its construction and repair, and that *they may build bridges, fix scales and weights, lay rails, may take and use earth, gravel, stone, tim-*

ber, or other materials which may be needed for the construction and repair of the said road or any of its works, and may make and construct all works whatever which may be necessary and expedient in order to the proper completion and maintenance of the said road; and they may make or cause to be made lateral railways in any direction whatever from the said railroad, and for the construction, repair and maintenance thereof shall have all the rights and powers hereby given in order to the construction and repair of said principal railroad, and may also own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication, provided nothing herein contained shall be construed to authorize the said company to take private property for their use without compensation agreed upon by the company and the owners thereof, or awarded by a jury as hereinafter provided, being first paid or tendered to the party entitled to receive such compensation."

The company was authorized by an act of Congress, approved March 18, 1869 (16 Stat., 1), to construct its railroad into the city of Washington, over certain streets, "to the intersection of south C and west Ninth streets," which, at that time, was the terminus of the line of railroad.

By the act of June 21, 1870 (16 Stat., 161), the company was authorized to extend its railroad, by way of Maryland avenue, to and over the Long Bridge, and to connect with other roads in Virginia.

The terminus of the railroad being fixed at the junction of 9th and C streets, the company had a right under its charter to construct stations, and so forth, there; even if it did not possess this right, it claimed and exercised it, and it has the right to be heard on that question in this Court, under this act of Congress.

Statutory authority to build and conduct a railroad includes the authority to build turnouts or side tracks, turn-tables, switches, depots, &c., those permanent and irremovable appendages which constitute parts of the complete structure.

L. S. R. R. vs. *U. S.*, 93 U. S., 453-4;
Township, &c., vs. *Strong*, 96 U. S., 276.

The decision of this Court in the case of *Dupasseur* vs. *Rochereau* (21 Wall., 134) seems to be decisive of the question of jurisdiction presented here.

That was a writ of error prosecuted under the provisions of section 709 of the Revised Statutes. A judgment had been rendered by the Circuit Court of the United States for Louisiana, on a vendor's privilege and mortgage, declaring it to be the first lien and privilege on the land; and the Marshal sold the property clear of all prior liens; and the mortgagee purchased, and paid into Court for the benefit of subsequent liens, the surplus of his bid beyond the amount of his own debt. This judgment and sale were set up by way of defense to a suit brought in the State Court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit in the Circuit Court. The State Court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to this Court by writ of error and a question was made as to jurisdiction. This Court sustained the jurisdiction. Mr. Justice Bradley, in delivering the opinion of the Court, said in reference to the question of jurisdiction:

"The case would be one in which a title or right is claimed under an *authority exercised* under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution, and it is clearly within the chart of appellate power given to this Court, over cases arising in and decided by the State courts." Although the Court sustained the jurisdiction, it held that the decision of the Court below was correct. See also

Embry vs. *Palmer*, 107 U. S., 9;
Day vs. *Gallup*, 2 Wall., 86;
Verden vs. *Coleman*, 1 Black., 472;
Chi. Life Ins. Co. vs. *Needles*, 113 U. S., 574;
R. R. Co. vs. *Maryland*, 21 Wall., 456;
McGuire vs. *Commonwealth*, 3 Wall., 382 and 387;
Hall vs. *Jordan*, 15 Wall., 393.

The motion to dismiss should be denied.

ENOCH TOTTEN,
For Pltff. in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1173.

BALTIMORE AND POTOMAC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THADDEUS A. HOPKINS, DEFENDANT IN ERROR.

In Error to the Supreme Court of the District of Columbia.

SAM'L MADDOX,
Att'y for Defendant in Error.

JUDD & DETWEILER, PRINTERS.

"The case would be one in which a title or right is claimed under an *authority exercised* under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution, and it is clearly within the chart of appellate power given to this Court, over cases arising in and decided by the State courts." Although the Court sustained the jurisdiction, it held that the decision of the Court below was correct. See also

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In Error to the Supreme Court of the District of Columbia.

MOTION TO DISMISS.

And now comes the defendant in error and moves the Court to dismiss the writ of error in this case, and for the following reasons:

First. Because the matter in dispute, being a judgment for $1,328, is not sufficient to give this Court jurisdiction.

Second. Because the case does not draw in question the validity of a treaty or statute of or authority exercised under the United States.

SAM'L MADDOX,
Att'y for Defendant in Error.

NOTICE.

To ENOCH TOTTEN, Esq,
Attorney for Plaintiff in Error.

Please take notice that on Monday, the 26th day of November, A. D. 1888, at the opening of the Court, or as soon thereafter as counsel can be heard, I shall submit the above motion. Accompanying this notice find also a copy of the argument upon which the motion will be submitted.

SAM'L MADDOX,
Att'y for Defendant in Error.

Service acknowledged this 3d day of November, 1888.

ENOCH TOTTEN,
Att'y for Plaintiff in Error.

STATEMENT OF THE CASE.

This suit is a common-law action on the case, brought in the supreme court of the District of Columbia by the defendant in error, Thaddeus A. Hopkins, against the Baltimore and Potomac Railroad Company for injuries resulting to him from a *nuisance* maintained by the railroad company on the public street in front of his door from the 5th day of October, 1880, to the 5th day of October, 1883, the day on which the suit was filed. Hopkins owns a dwelling-house on the north side of Maryland avenue south, between Ninth and Tenth streets west, in the city of Washington. Here he and his family, consisting of a wife and several children, made their home during the time embraced in the suit. He complained that the railroad company during that period used the public street at that point for the general purposes of a freight yard or depot. This company began its operations in that section of the city in July, 1872, on a single track. It seems to have made no provision whatever for handling freight, and, in order to accommodate its increas-

ing business, and as its needs required, it put down one track after another until the spring of 1880, when the last of five tracks was laid. During the succeeding years the north one of these tracks, nearest Hopkins' house, was used as a "through" track, the other four for the storage thereon of loaded and empty freight cars, for unloading and delivering freight, and for making up and breaking up freight trains.

All freight trains arriving in the city of Washington stopped on Maryland avenue, between Ninth and Tenth streets. This was their resting place. Here cars were detached and distributed to various points on the public streets to be there discharged of their freights, and cars unloaded elsewhere were brought here to be placed in trains. This process was going on day and night—all day long and all night long. It necessitated the almost constant presence in that locality of the shifting or yard engine, with its clouds of smoke and cinders, its noisome odors, and its unceasing jars and noises. The annoyances, discomforts, and inconveniences resulting from this unlawful appropriation of the public highway form the subject of this suit. The plaintiff offered testimony tending to prove that his house was almost constantly filled with dust and cinders from the shifting engine, which soiled and blackened his walls, furniture, and bed linen; that in the hot days and nights of summer it frequently became necessary to close doors and windows to keep out the smoke and heated steam; that the noises of the shifting of cars and making up of trains disturbed the sleep of himself and his family, and interfered even with ordinary conversation; that the atmosphere in that locality was polluted with foul odors and stenches from decayed and decaying vegetables thrown into the street from cars which were being unloaded in front of the plaintiff's door, and from uncleaned and filthy stock cars left standing at that point, and that it was not possible at any time during the three years to cross the street in front of his house without crawling

under or climbing over freight cars. The court instructed the jury that if they believed from the evidence that these things were done and so frequently as to annoy, harass, and disturb the plaintiff and his family, and to interfere with the comfortable enjoyment of their home, then the plaintiff was entitled to recover. But the court further told the jury that the plaintiff was "not entitled to recover for any annoyances, discomforts, or inconveniences to himself or his family, or for any injury to the use and enjoyment of said dwelling-house which resulted from such uses of Maryland avenue by the defendant as were reasonably incident to the careful conduct of its through business, and to the maintenance and careful use of its freight station abutting on the south side of said avenue, between said Ninth and Tenth streets, southwest." Under these instructions the jury found for the plaintiff and assessed his damages at $1,328, for which amount judgment was entered in his favor.

Numerous exceptions were taken by the defendant below (plaintiff in error) to the rulings of the trial justice, and a motion for a new trial on exceptions so taken was made. This being overruled, the cause was appealed to the general term and the judgment of the special term was there affirmed. To reverse this judgment the plaintiff in error sued out a writ of error from this Court.

BRIEF AND ARGUMENT.

This motion to dismiss is based upon the act of Congress entitled "An act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several Territories," approved March 25, 1885, 23 Statutes at Large, 443. This act provides:

> SECTION 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia or the supreme court of any of the Territories of the United States unless the matter in

dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

SEC. 2. That the preceding section shall not apply to any case wherein is involved the *validity* of any patent or copyright, or in which is drawn in question the *validity of a treaty or statute of or an authority exercised under the United States;* but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute.

The amount of the judgment is $1,328, which is insufficient to give this Court jurisdiction of the cause. True, the plaintiff below claimed $5,000, but the amount in controversy, as to the defendant, is fixed by the judgment.

Walker *vs.* U. S., 4 Wall., 164.

It becomes manifest at a glance, therefore, that this Court must take jurisdiction, if at all, under the second section of the act above quoted. This narrows the inquiry down to a single question—Was the *validity* of any statute of or authority exercised under the United States drawn in question in the court below?

We look through the record in vain for any claim, even, by the railroad company, that its appropriation of the public streets of Washington for freight-delivery purposes was by virtue of any statute of or authority under the United States. On the contrary, all that appears is that the Baltimore and Potomac Railroad Company is a corporation chartered by the laws of the State of Maryland. Its rights, powers, privileges, and immunities must, therefore, be sought in its act of incorporation, passed by the Legislature of Maryland, and a judicial interpretation of this act does not present a Federal question. No Federal question is made in the record.

"If the record shows upon its face that a Federal question was not necessarily involved, and does not show that

one was raised, we will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided."

Moore *vs.* Mississippi, 21 Wall., 639.
Rector *vs.* Ashley, 6 Wall., 142.
Walker *vs.* Villavaso, 6 Wall., 128.

No Federal question or claim of authority under the United States is directly raised by the pleadings, the proofs, or the requests for instructions. On this ground alone it is submitted that the writ of error should be dismissed.

But although not disclosed by the record, it is a fact that the Baltimore and Potomac Railroad Company came into Washington by virtue of permission extended to it by the Congress of the United States, and to fully understand the rights of the company it will be necessary to examine, somewhat in detail, the legislation of the State of Maryland and of Congress respecting its organization and franchises.

The Baltimore and Potomac Railroad Company was incorporated by an act of the Legislature of Maryland passed May 6, 1853. By its twelfth section the corporation was invested with the rights and powers necessary to the construction, working, use, and repair of a railroad from Baltimore to a point on the Potomac river not higher up than Liverpool Point, "with such branches at any point on said railroad, not exceeding twenty miles in length, as the president and directors may determine, * * * the said railroad, when completed, not to be more than sixty-six feet wide except at or near its depots or stations, where the width may be made greater, with as many tracks as the president and directors may deem necessary."

By an act of Congress approved February 5, 1867 (14 Statutes at Large, p. 387), the company was "authorized to extend into the District of Columbia a lateral railroad, such as the said company shall construct or cause to be constructed, in a direction towards the said District, in connec-

tion with the railroad which they are about to locate from the city of Baltimore to the Potomac river," and "to exercise the same powers, rights, and privileges, subject to the same restrictions, in the extension and construction of the said lateral railroad into and within the said District as they may exercise or are subject to under and by intent of their said charter in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, compensation, benefits and immunities in the use of the said road and in regard thereto as are provided in their said charter, except the right to construct any lateral road within the District from the said lateral branch or road hereby authorized."

By section 3 it was provided that the company, "in passing into the District and constructing their road within the same, shall enter the city of Washington at such place and shall *pass along* such street or alley to such point or terminus within the city as may be allowed by Congress, upon presentation of survey and map of proposed location of said roads: *Provided*, That the level of said road within the city shall conform to the present gradation of the streets, unless Congress shall authorize a different level."

By the act of Congress of the 18th of March, 1869 (16 Statutes at Large, p. 1), it was declared that the B. & P. R. R. Co. "may enter the city of Washington with their said railroad and construct the same within the limits of the said city on or by whichever one of the two routes therein designated the company may elect and determine," and by the act of March 25, 1870 (16 Statutes at Large, p. 75, sec. 2), a modification of the second of these two routes was authorized. The terminal point in each was described as a point at the intersection of South C and West Ninth streets, which was thus assigned by Congress as the western limit of the railroad within the city of Washington.

The company made choice of the second of the projected routes, commencing on the western shore of the Eastern

Branch, between South L and South M streets, and thence passing through K street and Virginia avenue to the terminal point on Ninth street.

Up to this time the company had not been authorized to construct their road to the Potomac river within the District. But by the act of 21st June, 1870 (16 Statutes, 161), Congress enacted "that the Baltimore and Potomac Railroad Company be, and they are hereby, authorized and empowered to *extend their lateral branch*, authorized by the act to which this is a supplement, and former supplements of said acts, *by way of Maryland avenue, conforming to its grade*, to the viaduct over the Potomac river at the city of Washington," and to extend the tracks over said bridge, and to connect with any railroad, constructed or that may hereafter be constructed, in the State of Virginia, and the act authorized the railroad company, to effect these purposes, to take possession of the bridge free of cost and maintain the same, etc. It was by virtue of the authority granted by this act that the railroad extended its "lateral branch" to the Potomac river from Ninth street south, by way of Maryland avenue; and it was further authorized by the act of March 3, 1871 (16 Statutes, p. 585), in making this extension, to change the grade of Maryland avenue from Twelfth street to the Long Bridge in the manner specified in that act, under the supervision of the municipal authorities of Washington.

The act of Congress of May 21, 1870 (17 Statutes, 140), relating to the establishment of the passenger depot of the company at Sixth and B streets, makes mention of no streets or avenues except B street and Sixth street and Virginia avenue.

These are all of the acts passed by Congress relating to the Baltimore and Potomac railroad, and it will be noticed that only one of them (the act last above referred to) authorizes the construction of depots or stations within the limits of the city of Washington. This *omission* has been construed

by the president and directors of the company as giving them the right to establish their principal freight yards and freight deliveries in the public streets, Maryland and Virginia avenues being especially appropriated to these purposes.

None of these acts specified how many tracks may be laid down along Maryland avenue between Ninth street and the Long Bridge and in front of Hopkins' house. In fact, the only provision in any of the acts, relating to Maryland avenue, is to be found in the 16 Statutes, 161, *supra*, and in the words "to extend their lateral branch, authorized by the act to which this is a supplement, and former supplements of said acts, by way of Maryland avenue, conforming to its grade, to the viaduct," &c. But it is insisted on behalf of the railroad company that all the rights and privileges granted by the original charter are in full force with respect to this *extension* along Maryland avenue. Section 12 of the original charter contains this language: "The said road, when completed, not to be more than sixty-six feet wide, except at or near its depots or stations, *where the width may be made greater, with as many tracks as the president and directors may deem necessary*," and it is contended that, by force of this provision as adopted, it is said, into the lateral branch extension, the company may lay down along Maryland avenue and other streets, along which it is authorized to pass, as many tracks as can be accommodated within the width of sixty-six feet. But it was manifestly not the intention of Congress that this provision should apply to the streets of Washington, and for the reason, if no other, that K street, which is but eighty feet wide, and is one of those along which the road is authorized to pass, would be practically closed to public travel if sixty-six feet were taken out of it for exclusive railroad purposes. Now, it does not appear that in granting a right of way to this company Congress intended to close up any of the streets of Washington.

But, again, the railroad company, without any express authority of law, has seen fit to locate a freightstation on square 386, a small triangular patch of ground abutting on Maryland avenue, between Ninth and Tenth streets, and opposite Hopkins' house. Now, the charter quoted above also provides that "at or near depots or stations the width may be made greater [than sixty-six feet], with as many tracks as the president and board of directors may deem necessary." At this particular point, then, there is, according to the company's contention, no limit to the number of tracks that may be laid, except the discretion of the *president and board of directors;* and, further, if the company can locate a freight station at this point, without express authority from Congress, it can place similar stations along its road all the way from the tunnel to the Long Bridge, and then put down as many tracks as can be accommodated within the width of the several streets from building line to building line, provided only the president and directors see fit to do so. In other words, that there is now room for a narrow carriage-way and foot-walks along Maryland and Virginia avenues, outside of the railroad tracks, along which the public may pass, is due entirely to the grace and courtesy of the Baltimore and Potomac Railroad Company, its president and board of directors. That Congress would entrust any such power to a corporation, actuated only by motives of private gain, may well be doubted.

But, however this may be, the case as presented here does not question the right of the railroad company to establish freight stations, or to lay as many tracks along the streets of Washington as its "president and board of directors may deem necessary." On the contrary, all of this is carefully eliminated from the controversy by the rulings of the court below; but Mr. Hopkins, the defendant in error, does complain of the *uses* made of those tracks after they were laid, without reference to their number. He does not question

the validity of any law of Congress or of any authority exercised under the United States, but he does contend that there is *no law* and *no authority* giving this company the right to use the public streets as a storage place for loaded and empty cars, for unloading and delivering freight, or for shifting cars and making up freight trains—operations, all of them, which should be conducted on the private grounds of the railroad company. To do all of these things the plaintiff in error claims a license where there is no law, and comes here asserting that this case calls in question the validity of an authority that has no existence.

In the case of Millingar *vs.* Hartupee, 6 Wallace, 261, this Court says:

"Something more than a bare assertion of such an authority [under U: S.] seems essential to the jurisdiction of this Court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of *claims* of authority under the United States.

"In respect to the question we are now considering 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this Court could review the decision of a State court that the right claimed did not exist.

"In many cases the question of the existence of an authority is so closely connected with the question of its validity, that the Court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits or except upon hearing in regular order; but where, as in this case, the single question is not of the validity, but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the State court against any authority under the United States existing in fact, and that we have, therefore, no jurisdiction of the cause brought here by writ of error. we can perceive no reason for retaining it upon the record."

See also Mining Company *vs.* Boggs, 3 Wallace, 304, which was an action of ejectment brought for the possession of certain mineral lands in California. The defendant contended that he was in possession of the lands by virtue of an authority inferred from the general policy of the United States in relation to mines of gold and silver and the lands containing them. In deciding the case this Court says:

"We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this Court.

"However that may be, there was no decision of the court against the validity of such a license. The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties rather than a judgment upon a question of law.

"It is the same case, in principle, as would be made by an allegation in defense to an action of ejectment of a patent from the United States, with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. (?) Such a judgment would deny not the validity, but the existence, of the patent, and this Court would have no jurisdiction to review it."

The case at bar then resolves itself into this: The railroad company is sued for damages resulting to a private citizen from an appropriation of the public highway in front of his door for freight-yard purposes. The company does not plead, but at the trial asserts, statutory authority for the acts complained of. On looking into the various statutes no word can be found granting such an authority. The court below so decides and a writ of error is sued out, although the judgment recovered is less than the amount required to give this Court jurisdiction. If the case is retained and heard over again on its merits, then it may well be expected that every case against this company in which there is an adverse judgment, however trifling the amount, will be brought here on similar pretexts.

For instance, suppose the company is sued in the supreme court of the District of Columbia for negligence in failing to deliver a car-load of lumber, loaded in Baltimore and consigned to a dealer in Washington. It pleads the general issue and the statute of limitations, as in the case now under consideration. On the trial it appears that the lumber was placed on one of the company's cars and the freight prepaid one month before suit was brought, but never reached its destination, having been destroyed by fire in a wreck on the way resulting from carelessness of the company's employees. Verdict and judgment for $1,328 are rendered against it, in spite of the insistence of its counsel that the statutes of Congress exempt the corporation from liability for loss occasioned by carelessness on the part of its employees.

Or, again, suppose the company is sued in the same court for personal injuries to a resident of Washington, caused by being struck, at the intersection of Tenth street and Maryland avenue, by one of the company's trains rushing by at the rate of sixty miles an hour. It again pleads the general issue and the statute of limitations. On the trial it is shown that the person injured was walking up the east side of Tenth street from the river on his way to the business center of this city, at nine o'clock in the morning, and six months before suit brought. Approaching Maryland avenue, he notices long lines of box-cars, stored there by the company, flush up with the east line of Tenth street, and extending as far as Ninth street. These cars are standing on the four south tracks, the north track being reserved for "through" trains. There is no gate to check his advance—no watchman to warn him of his danger. As he passes the last line of standing cars and is about to set foot upon the north track, he notices for the first time the rapidly moving train, coming from the east and only a few feet away. Before he can get out of the way he is struck by the engine and receives severe bodily injuries. Verdict and judgment for $2,500 are entered against the company, in spite of the assertion of

counsel that the statutes of Congress give the corporation the right to blockade the streets of Washington with its cars, and to run its trains through the city at the reckless speed of sixty miles an hour.

Let us suppose, further, that both cases were appealed to the court in general term, the judgments there affirmed, and writs of error sued out, bringing the cases into this Court. The amount in controversy in each case being insufficient to give jurisdiction, would not this Court, on a motion to dismiss writs of error, look into the statutes to see whether or not they conferred on the company any such extraordinary powers as those claimed; and, finding none, would this Court hold that the validity of an act of Congress or authority derived from the United States was called in question merely because the counsel for the railroad company makes such a claim?

In this connection the illustration put by Mr. Justice Miller, who delivered the opinion of the Court in Murdock *vs.* City of Memphis, 20 Wallace, 628 (foot), is entirely applicable.

The defendant in error claims compensation for the many annoyances to himself and his family arising not from the legitimate operations of the plaintiff in error, but from its appropriation of the street in front of his door for freight-yard purposes. He contends that there is no law of Congress granting to this company the right to obstruct Maryland avenue with its cars, to there load, unload and deliver freights, and to use the public highway at that point as a general shifting ground for trains and cars. The sole question presented by this record, of which this Court can take cognizance, is: Does any law of Congress authorize this company to use the streets of Washington along which it is authorized to pass for the general purposes of a freight yard and freight delivery? If not, then it must follow that the case does not draw "in question the validity of a treaty or statute of or an authority exercised under the United States."

ASSIGNMENT OF ERRORS.

We shall refer to the assignment of errors as set out in the record (p. 40) merely because as there given it is misleading.

FIRST. The supreme court of the District of Columbia *did not* deny the right of the defendant company to use its tracks in Washington, on Maryland avenue between Ninth and Tenth streets, in a lawful manner for the purpose of transacting its lawful business. On the contrary, the trial court distinctly told the jury that "the plaintiff is not entitled to recover for any annoyances, discomforts, or inconveniences * * * which resulted from such uses of Maryland avenue by the defendant as were reasonably incident to the careful conduct of its through business, and to the maintenance and careful use of its freight depot or station abutting on the south side of said avenue, between said Ninth and Tenth streets southwest" (Record, p. 26), and in the general charge of the court (Record, p. 37) the lawful uses to which the street might be put by the defendant company were clearly explained to the jury.

SECOND. The court told the jury that all stoppage of trains and shifting of cars necessary in the use of the freight station was lawful (Instruction 8, Record, p. 26). For any other shifting of cars at that point there is no authority of law, nor is there any necessity. It is simply a device of the railroad company to save the money which ought to be expended in the purchase of sufficient ground to accommodate its freight business.

THIRD. The instruction herein referred to, though open to serious objection, was granted by the court. (Instruction 14, Record, p. 28.)

FOURTH. The instruction referred to in this assignment of

error was also granted, so far as relates to the freight station near that point. (Instruction 1, Record, p. 27.)

There was no competent evidence to show the legal existence of any other stations "at or near" the point in controversy.

FIFTH. The instruction herein referred to was granted. (Instruction 19, Record, p. 28.)

No right or power granted to this railroad company was denied, nor was the validity of any enactment of Congress attacked or questioned in the court below.

In conclusion, we desire to briefly call the attention of the Court to the several laws regulating appeals from the supreme court of the District of Columbia. Section 847 of the Revised Statutes relating to the District of Columbia provided that appeals might be taken in all cases where the matter in dispute is of the value of $1,000 or upwards. This was changed by the act of February 25, 1879 (20 Statutes at Large, p. 320), and it was then ordained that the amount in dispute must exceed $2,500. But by the act of March 25, 1885 (23 Stat. at Large, 443), all appeals, except in cases presenting what may be termed *Federal* questions, were taken away "unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." This is the present law. It will be seen at a glance that it was the evident intention of Congress to restrict appeals to this Court from the supreme court of the District of Columbia, thereby to relieve the dockets and lessen the labors of this tribunal. But if jurisdiction is taken of the case now under consideration, involving only the sum of $1,328, the door will be opened to numerous appeals, irrespective of the amounts in controversy; for, in such an event, it may well be expected that appeals will be taken from the final judgment of the supreme court of the District of Columbia in all of the fol-

lowing cases: Against all corporations, whether incorporated by special charter or under the provisions of the general incorporation law; to enforce mechanics' liens; against married women; proceedings for divorce; all criminal prosecutions, and to enforce any and all rights given by valid acts of Congress. That Congress intended that the dockets of this Court should be flooded with frivolous appeals, involving trifling amounts, cannot be supposed.

Wherefore we respectfully submit that the writ of error should be dismissed.

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Of Counsel.